

United States  
Court of Appeals

For the Ninth Circuit

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EQUITABLE LIFE AND CASUALTY  
INSURANCE CO.

*Appellant,*

vs.

VIRGIL N. LEE,

*Appellee.*

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**Appellant's Reply Brief**

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Appeal from the United States District Court  
for the District of Oregon.

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Concerning the summary of argument and statement of jurisdiction at page 2 of Appellee's Brief, the Appellee mentions that it is necessary to plead and establish by proof the fact that plaintiff has no plain, speedy and adequate remedy at law in order to evoke the aid of a court of equity. This comment is simply not true in a case in which fraud is alleged because in such a situation, the plaintiff has an election of remedies, either to disaffirm and rescind the contract or to affirm the contract and sue in an action for damages for fraud.

Appellee misconstrues the language contained in the case of *Herman v. Mutual Life Insurance Co. of New York*, 108 F2d 678, 127 ALR 1464. The holding in the

Herman case, *supra*, does not concern waiver of the fraud, but rather says that there was no fraud at all in the sale of the insurance policy.

*Sheppard v. Blitz*, 177 Or 501, 163 P2d 519, is cited by Appellee as authority for the proposition "that one seeking damages, as contrasted to rescission, by reason of fraud, does not need to act with the same dispatch as he would do if he were seeking to rescind." This case is not an authority for that point. The action was promptly filed in that case. The case went up to the Supreme Court of the State of Oregon on one theory, was sent back because of the defect of parties defendant, was retried in the trial court on another theory and then went back up to the Supreme Court of the State of Oregon on another appeal. There certainly was no lack of diligence on the part of plaintiff in that case.

At page 7 of Appellee's brief, Appellee cites the case of *Scott v. Walton*, 32 Or 460, P 180. Quoting from the opinion as cited therein:

"He cannot retain the fruits of the contract awaiting future developments to determine whether it would be more profitable for him to affirm or disaffirm."

This language, of course, means that there can be a waiver of a right to bring an action for damages for fraud as well as a waiver of a right to rescind. The following is a further quoted portion from *Scott v. Walton*, *supra*:

"Any delay on his part, and especially his remaining in possession of the property, received by him under the contract, and dealings with it as his own,

will be evidence of his intention to abide by the contract.”

Again the Appellee misses the point of *Grange v. Penn Mutual Life Insurance Company*, 235 Pa 320, 321; 84 At 392, 396. This case was cited by Appellant and voluminously briefed by Appellant to show that there was in fact no fraud in the sale of the insurance policy.

Concerning punitive damages, there are several cases cited by Appellee. *Pelton v. General Motors Acceptance Corporation*, 139 Or 198, 7 P2d 263, and *General Motors Acceptance Corporation v. Froelich*, 273 F2d 92, are both concerned with wrongful repossession of an automobile. *McCarthy v. General Electric Co., et al*, 151 Or 519, 49 P2d 993 concerned an action for conversion of some electric switches. *Pacific Telephone & Telegraph Co. v. White*, 104 F2d 923, involved a case of assault and battery by a chief special agent for Pacific Telephone & Telegraph Company. This agent was trying to get the plaintiff to confess and tell him the names of accomplices. An armed robbery had been committed upon one of defendant's cashiers. During this questioning, the chief special agent struck the plaintiff about the head and neck and rendered him unconscious, whereupon it was necessary to remove him from the jail immediately to a hospital where he remained for a long time.

None of the above cases are in any way similar to the fact situation before this Court. As this Court well knows, it is extremely difficult to generalize where punitive damages are awarded. The facts of each particular

case must be tested before punitive damages can be awarded. At page 11 of Appellee's brief, Appellee talks about Mr. Reklau not being a "menial servant". This is probably correct, but Mr. Reklau did not sell Dr. Lee the insurance policy. The policy was sold by Mr. Rognlie and Mr. Myers. Mr. Reklau did not meet Dr. Lee until after the policy was sold. The court found as a fact the plaintiff's Exhibit 6 was not shown to him prior to his purchase of his policy.

The case of *Union Deposit Co. v. Moseley*, (Texas Civil Appeals) 75 SW2d 190, is very similar to the facts alleged by Appellee in this case. In fact, *Union Deposit Co. v. Moseley*, supra, is a much stronger case than this case before the Court. In that case, representations were made by the Vice-President-Treasurer and by the State Manager of Sales for the corporation. The Court held that these representations did not bind the corporation for exemplary damages unless it knowingly authorized and ratified the fraud. In this case, the alleged representations were made by two selling agents, Mr. Myers and Mr. Rognlie. They are the agents who sold Dr. Lee the policy. It is the representations of two life insurance sales agents which are in issue here. They made predictions of future earnings and dividends. If these statements are found to be fraudulent, are they sufficient to hold the insurance company responsible by way of punitive damages as well as actual damages? At the time the estimates of future growth were made, it cannot be said that they were made maliciously or knowing that they were false.

**CONCLUSION**

For the foregoing reasons, as well as for the reasons set forth in our main brief, we respectfully submit that the judgment of the trial court should be reversed.

Respectfully submitted,

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